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"ESTATES IN EXPECTANCY"

Beyond question, the law as to "estates in expectancy" is the most unsatisfactory part of our jurisprudence,—reversions, reversionary interests, vested and contingent remainders, executory bequests and devises *et id omne genus* seeming to our text-writers and courts as matters to be approached from the standpoint of "the nicest and most abstruse learning", rather than as having frequent and immediate application to the affairs of everyday life and as requiring for the solution of the problems that they may present only logical reasoning from fundamental principles. Also the many adjudicated cases bearing upon these matters, so far from resulting in clear and definite rules, have, with their increasing number, but added to the confusion and difficulties with which feudal doctrines, long obsolete, originally surrounded them.

In this paper an attempt is made to analyze the general situation as to "estates in expectancy" from the basis of fundamental legal principles, disregarding for the time being certain rules and doctrines with which the conclusions here deduced may conflict. Later, these and other long current rules and doctrines bearing upon the subject under consideration are discussed from the standpoint of the conclusions here deduced.

For the purposes of brevity and clearness this discussion will be limited chiefly to remainders, so-called, created by will, but it is believed that the reasoning will apply, *mutatis mutandis*, to remainders however created, as well as to reversions, executory interests and all other forms of "estates in expectancy."

When a complete estate in anything subject to private ownership vests in a person, this estate includes with right of immediate possession and enjoyment the right of this person to have this possession and enjoyment and all other property rights pertaining to the *res* continued in "himself, his heirs and assigns forever", or so long as this *res* exists; this right to have such possession and enjoyment so continued being, it would seem needless to say if it

As is pointed out in the following pages, "estates in expectancy" are, as entities, impossible. The term is the result of erroneous concepts and itself a frequent source of error; it is here used in the meaning usually attached to it in default of any other and better term to indicate the nature of this discussion.

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were not so generally assumed to the contrary, as much a present right as is the right of immediate possession and enjoyment itself. We live, act and have rights in the present, a "future right" is as unthinkable as a future today, the term is self-contradictory, and so, for the same reason, is the expression "estates in expectancy" itself in so far as it is held to denote anything in the nature of actual property rights.

Property rights may be devised or bequeathed either absolutely or subject to conditions, and these conditions may, in legal parlance, be either subsequent or precedent.

A will speaks for the testator at the moment of his decease, and when, so speaking it distributes the property rights relative to the thing bequeathed or devised, so that certain of these rights, essentially those of immediate possession or enjoyment vest in a certain person subject to be divested on the happening or coming to pass of an event sure to occur, a condition subsequent, while the residuary property rights in the *res* are vested in another person, a vested remainder is said to be created in the latter, the rights of the former, the holder of the particular estate, are, however, none the less vested in him, but vested subject to be divested by an event sure to occur. The estate of each in the *res* is but a limited or partial one, and each of these partial estates is complementary to and contemporaneous with the other; the existence of one necessarily involves the existence of the other and both together make up the full estate in the *res*, in other words, the sum total of the property rights relative thereto.

So far as we now are concerned, the limitation of the present possession or enjoyment of the *res* by an event, a condition subsequent, sure to occur, is the essential characteristic of a particular estate, while the essential characteristic of a vested remainder is the fact that its holder must wait for the happening or coming to pass of an event, a condition precedent, sure to occur before he can enjoy the full estate in the *res*.

When the estate in a *res* is bequeathed or devised to a person, subject to be divested on the happening or coming to pass of an event, a condition subsequent, that may or may not occur, but on the occurrence of which this estate would pass to another specified person, a "contingent remainder" is said to be created in the latter. The term "remainder" as used in this connection is either a misnomer, or we must attribute to it a meaning entirely different from what it bears in the term "vested remainder", for not-

withstanding the almost uniform use of the term to the contrary by our text-writers and courts, under such a bequest or devise a full, not a partial or particular estate vests in the first taker and there remains until divested by the occurrence of the event or condition subsequent specified, if it ever occurs; in such a case there is also no residuary estate or remainder, actual or contingent created by the will. The so-called remainder-man has no estate whatever in the *res*, he has but a chance or possibility of acquiring an estate therein on the condition (precedent), that a certain event which may or may not occur, happens or comes to pass, this condition precedent being assumed for the present to be identical as a fact or event with the condition subsequent on the happening or coming to pass of which the estate of the first taker is divested from him, and farther, it seems almost needless to repeat, the estate in the *res* which the so-called contingent remainder-man has a chance or possibility of taking, is not a partial estate, a remainder, but a full estate therein; his interest is not a possible or contingent remainder, but a possible or contingent full estate in the *res*.

Not only, as is assumed in the above discussion, may a person be endowed with a full or complete estate in the *res* subject to be divested by an event that may or may not occur, but on the occurrence of which this estate would vest in another specified person, but the testator may provide in his will that the one who is to have the immediate enjoyment of the *res* shall have but a limited estate therein, that is, an estate to be divested on the happening or coming to pass of an event sure to occur, while the potential beneficiary is to take the full estate in the *res* on the happening of another event that may or may not happen or come to pass; now this latter event, the occurrence of which is made the condition precedent to the taking of the estate in the *res* by the possible beneficiary might happen prior or subsequent to the event which terminates the estate in the first taker or contemporaneous, perhaps necessarily so, with it. Each of these conditions will now be considered and illustrations will best serve as bases for our discussion.

A devises to B for life with "remainder over to C if C shall live until he reaches the age of twenty years. On the decease of A, B takes a partial or limited estate in the *res*, in other words, a particular estate; accordingly, the residuary property rights, or remainder of the estate therein must then vest in the residuary de-

visees of A, or, if none such be provided in the will, in the heirs of A, subject to be divested by C. becoming twenty years of age. If C dies before attaining this age, but before the decease of B, this remainder vests indefeasibly in these devisees or heirs. If B dies before C becomes twenty years of age then, following the present line of reasoning, the full estate would vest in the residuary devisees or heirs of A, subject to be divested by C reaching the age necessary to have the full estate vested in him. If, on the other hand, C becomes twenty years of age before the decease of B, on his reaching this age the remainder of the estate in the *res* over and above the estate vesting in B divests from the residuary devisees or heirs of A and vests in C, or, in other words, C will then have a vested remainder of the estate.¹

If A devises to B for life with "remainder" over to C if C shall survive B, C, of course, has but a chance or possibility of acquiring an estate in the *res*, his taking being subject to the occurrence of an event, a condition precedent, that may never come to pass, but coming to pass is necessarily contemporaneous with the event that terminates the estate in B. Here, during the lifetime of B, the remainder of the estate over and above the limited or particular estate in B, must vest in the residuary devisees or heirs of A, subject to be divested by the event, the condition subsequent, of C surviving B; if, however, C dies before the decease of B, this remainder vests indefeasibly in the residuary devisees or heirs of A. If, on the other hand, C becomes twenty years of age before the decease of B, on his reaching this age the remainder of the estate over and above that vesting in B divests from the residuary devisees or heirs of A and vests in C, in other words, C will then have a vested remainder in the *res* to take effect in possession and enjoyment on the death of B.

If A devises to B for life with remainder over to C if C shall survive B, C, of course, has but a chance or possibility of acquiring an estate in the *res*, his taking being subject to the occurrence of an event, a condition precedent, that may never come to pass, but coming to pass, is necessarily contemporaneous with the event that terminates the estate in B. In this case, during the life of B, the remainder of the estate over and above the particular estate

¹ For the present we are concerned only with reasoning from the basis of fundamental principles; later will be discussed the rule that a remainder must take effect in possession immediately on the termination of the particular estate.

vesting in him must vest in the residuary devisees or heirs of A subject to be divested by the condition subsequent of C surviving B, and if C dies before the decease of B, then this remainder vests indefeasibly in the residuary devisees or heirs of A.

If the estate be devised to B with no limitation as to the life of B or otherwise, but with "remainder" over to C if C shall survive B, B on the decease of the testator takes a full estate in the *res*, subject to be divested from his heirs or assigns in the event of C surviving him; in the event of C predeceasing B, on the death of C the full estate in the *res* is indefeasibly vested in B. In this situation, the residuary devisees or heirs of the testator have no property rights or interests in the *res* whatever, either vested or contingent.

A further illustration showing an application of this last analysis to conditions that might easily arise might not be amiss: A devises to his son B with "remainder over" to B's wife C if she should survive B. B and C are lost at sea in the same shipwreck, or in some other way lose their lives under such circumstances as render it extremely difficult, if not impossible, to determine which survived the other. Under such conditions the conflicting claims of the heirs of B and of the heirs of C would be determined by the fundamental rule of evidence that he who asserts the claim has the burden of proof and as the estate was vested in B, it would remain in his heirs and assigns unless the heirs of C could show that it was divested by the event, the condition subsequent, of C surviving her husband. If the estate was devised to B for life with "remainder over" to his wife C if she survived him, then by a parity of reasoning, on the death of B and C under such circumstances as those above suggested, the remainder vesting in the residuary devisees or heirs of the testator would as the full estate in the *res* continue in these devisees or heirs until the heirs of C could show that C survived B.

Granting that the assumptions as to estates, or property rights, made in the preceding discussion are sound and that there are no fallacies or breaks in the reasoning based on these assumptions, it follows that the answer to the question as to whether a given "remainder" is vested or "contingent" will depend on whether by the will creating it such remainder the enjoyment of the *res* in full ownership must await an event, a condition precedent, sure to occur, or whether such enjoyment of the *res* is subject to an event, a condition precedent that may or may not occur, and this is to be

determined by the evidence in the case, by the terms of the instrument itself as these terms are logically interpreted according to the accepted canons of construction, and in view of such evidence *aliunde* as may be legally admissible.

The danger of holding that the "Rule in Shelley's Case" is a rule of construction or of evidence might be suggested in this connection; this rule, however, is essentially different in its character from the generally accepted rules as to "estates in expectancy" which we have inherited as corollaries of feudal doctrines. The "Rule in Shelley's Case", whatever may have been its origin, was fundamentally and independently a rule of public policy, an ultimate and substantive law; the great mass, however, of the commonly accepted rules as to remainders, reversions, and the like, involving "the nicest and most abstruse learning", were for the greater part built upon the feudal doctrine of the necessity of livery of seizin to effect the conveyance or transfer of land; but notwithstanding the fact that "livery of seizin" has long been obsolete both in this country and other countries where the common law has formed the basis of their legal systems, these rules, contravening the clearest deductions from fundamental legal principles, and in spite of the healthful principle of *ratione cessanti, lex cessat*, still remain to perplex and confuse both lawyers and courts.

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